Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

HEATHER ANN SEWELL,

Petitioner,

v.

TOWN OF LAKE HAMILTON,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

JOSEPH H. VARNER
Counsel of Record
CURTIS ALEXANDER & VARNER
Post Office Box 189
Winter Haven, Florida 33882-0189
(941) 297-5111

and

MICHAEL S. HOOKER
GLENN RASMUSSEN & FOGARTY, P.A.
Post Office Box 3333
Tampa, Florida 33601-3333
(813) 229-3333

Attorneys for Heather Ann Sewell, Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

I. WHETHER THE COURT SHOULD RECONSIDER *MONELL V. NEW YORK CITY DEPT. OF SOCIAL SERVS.* AND OVERRULE OR CLARIFY THE CONSTRUCTION OF 42 U.S.C. §1983 THAT CONDITIONS MUNICIPAL LIABILITY FOR CONSTITUTIONAL INJURIES UPON A MUNICIPAL POLICY OR CUSTOM THAT CAUSES THE INJURY?

II. WHETHER THE ELEVENTH CIRCUIT'S OPINION CONFLICTS WITH ITS PRIOR OPINION IN *VINEYARD V. COUNTY OF MURRAY* BY CREATING AN EXCEPTION TO 42 U.S.C. §1983 LIABILITY BASED ON THE NATURE OF THE MUNICIPAL EMPLOYEE'S CONDUCT THAT INFLICTS THE CONSTITUTIONAL INJURY, EVEN THOUGH THE MUNICIPALITY MAINTAINED POLICIES AND CUSTOMS WITH DELIBERATE INDIFFERENCE TO THE RIGHTS OF ITS CONSTITUENTS AND THOSE POLICIES AND CUSTOMS WERE THE MOVING FORCE BEHIND THE INJURY?

III. SHOULD A MUNICIPALITY BE EXONERATED FROM MUNICIPAL LIABILITY UNDER 42 U.S.C. §1983 BASED ON THE NATURE OF THE MUNICIPAL EMPLOYEE'S CONDUCT THAT INFLICTS THE CONSTITUTIONAL INJURY, EVEN THOUGH THE MUNICIPALITY MAINTAINED POLICIES AND CUSTOMS WITH DELIBERATE INDIFFERENCE TO THE RIGHTS OF ITS CONSTITUENTS AND THOSE POLICIES AND CUSTOMS WERE THE MOVING FORCE BEHIND THE INJURY?

QUESTIONS PRESENTED – Continued

IV. WHETHER THE ELEVENTH CIRCUIT'S OPINION CONFLICTS WITH *CITY OF CANTON V. HARRIS* BY EXCUSING A MUNICIPALITY FROM 42 U.S.C. §1983 LIABILITY BASED ON THE CONDUCT OF THE MUNICIPALITY'S EMPLOYEE WHEN THE MUNICIPALITY ADMITTEDLY MAINTAINED CUSTOMS AND POLICIES OF INADEQUATE TRAINING, SUPERVISION, AND REPORTING AND HANDLING OF CITIZEN COMPLAINTS AGAINST POLICE OFFICERS WITH DELIBERATE INDIFFERENCE TO THE RIGHTS OF ITS CONSTITUENTS AND THOSE POLICIES AND CUSTOMS WERE THE MOVING FORCE BEHIND THE INJURY?

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PETITION FOR WRIT OF CERTIORARI

Heather Ann Sewell petitions for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered on July 21, 1997.

OPINIONS BELOW

The opinions below are:

1. July 21, 1997, opinion of the United States Court of Appeals for the Eleventh Circuit, *Heather Ann Sewell v. Town of Lake Hamilton*, 117 F.3d 488 (11th Cir. 1997). (Appendix App. 1).

2. March 7, 1995, Order from United States District Court, Middle District of Florida, Tampa Division. (Appendix App. 7).

3. May 2, 1995, and November 21, 1995, Judgments of the United States District Court, Middle District of Florida, Tampa Division. (Appendix App. 8 and App. 9).

JURISDICTION

The Court of Appeals entered its judgment on July 21, 1997. This Petition for Writ of Certiorari has been filed within ninety days of that judgment. Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

42 U.S.C. §1983 provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the

party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

A. District Court Jurisdiction.

The jurisdiction of the United States District Court was invoked under 28 U.S.C. §1331 because Ms. Sewell's claim arose under 42 U.S.C. §1983.

B. Procedural Summary.

Heather Ann Sewell sued the Town of Lake Hamilton under 42 U.S.C. §1983 for damages resulting from a Lake Hamilton police officer's sexual assault of Ms. Sewell. A federal jury in Tampa, Florida, determined that Ms. Sewell proved all the elements of a §1983 claim and entered a verdict in her favor, resulting in a judgment for damages, costs, and attorneys' fees. Lake Hamilton appealed, claiming among other issues that the District Court erred in failing to grant Lake Hamilton's motion for summary judgment and motion for judgment as a matter of law. The United States Court of Appeals for the Eleventh Circuit held that the District Court wrongly denied the motions for summary judgment and for judgment as a matter of law and reversed the judgment, remanding the case for entry of a judgment in favor of Lake Hamilton.

C. The Facts.

1. The Assault On Heather Ann Sewell.

At approximately 3:00 a.m., May 13, 1991, Heather Ann Sewell was driving home when she was stopped by Lake Hamilton Police Officer Paul Stines. Officer Stines advised Ms. Sewell that her car fit the description of "a drug user's car" and asked for permission to search the car, which she granted. Officer Stines claimed to find a small bag of marijuana in her car. Officer Stines began

interrogating Ms. Sewell and asked whether she used illegal drugs and whether she "gave rides to any black people." Ms. Sewell, who had never used illegal drugs, became frightened and began crying. (R5:106; 66-73)

Officer Stines then changed his demeanor and began calling Ms. Sewell "Heather" and instructed her to call him "Paul." He introduced sexual innuendo into the conversation and commented that a woman had once made sexual overtures to him in an attempt to avoid a traffic ticket. He asked Ms. Sewell about her boyfriend. Alone and in the middle of the night, Ms. Sewell believed Officer Stines intended to abduct and rape her. (R5:106; 73-76)

Officer Stines then ordered Ms. Sewell to follow him to the police station so he could "look through some law books" and decide what to do. Ms. Sewell was relieved because she assumed other police officers would be at the police station and would supervise Officer Stines's behavior and protect her from his advances. Before embarking on the trip to the Lake Hamilton police station, Officer Stines warned Ms. Sewell not to try to escape because he knew where she lived. (R5:106; 74-76)

Upon arrival at the Lake Hamilton Police Station, Officer Stines informed Ms. Sewell that the two of them would be the only people there. As discussed below, consistent with Lake Hamilton's policies and customs, Officer Stines, a rookie of seven months, was the only officer on duty and had no supervision. Ms. Sewell considered fleeing, but remained out of fear that Office Stines would shoot her if she tried to escape. (R5:106; 76)

Officer Stines and Ms. Sewell entered the Lake Hamilton police station at 3:30 a.m. Inside the station, and after purporting to conduct legal research, Officer Stines advised Ms. Sewell that the amount of marijuana he claimed he found in her car was sufficient to keep Ms. Sewell in jail overnight. He arrested her, read her the *Miranda* warnings, and advised her that an arrest would

be on her record forever. Ms. Sewell started crying again, knowing that she had been wrongfully arrested because the marijuana was not hers. (R5:106; 78)

Officer Stines then proposed a solution – he would allow Ms. Sewell to go home if she would allow him to "strip search" her. Ms. Sewell refused, but stated she would consent to a strip search by a female officer. Officer Stines then issued an ultimatum: submit to a strip search by him or be arrested and jailed for drug possession. Although Ms. Sewell feared Officer Stines would rape and kill her, she again refused to consent to a strip search. Officer Stines became agitated and announced that Ms. Sewell would be incarcerated overnight. (R5:106; 81-83)

Officer Stines then offered one last time to release Ms. Sewell in exchange for her submission to a strip search and added that, if Ms. Sewell had made a sexual advance toward him, he would have "taken [her] up on it." At this point, Ms. Sewell believed she was "going to get raped no matter what I was going to do; that one way or another, it was going to happen, and he was just building up to it." Officer Stines then told Ms. Sewell that he would let her go home if she would let him "sexually harass" her. She began sobbing uncontrollably and begged Officer Stines to let her go. He remarked "I can see this is going nowhere," and continued to fill out an arrest form. (R5:106; 86-87)

Faced with the prospect of being jailed on false drug charges and in fear of her life, Ms. Sewell, still sobbing, told Officer Stines that he could do whatever he wanted if she "could just go home." Officer Stines did just that. (R5:106; 88-89)

He began by fondling her breasts through her clothes. He then instructed her to take off all of her clothes, lie naked, and spread her legs, on Lake Hamilton's police station floor. As she lay naked on the police

station floor, spread eagle, sobbing and shaking uncontrollably, Officer Stines continued to fondle her breasts and between her legs. Ms. Sewell cried and begged Officer Stines to please stop and let her go home. Officer Stines told Ms. Sewell "[I've] never had a redhead before." Officer Stines continued to molest Ms. Sewell for what she said felt like forever. Finally, he allowed her to rise and get dressed. Before letting her go, however, Officer Stines warned Ms. Sewell never to tell anyone what he had just done to her, or he would prosecute her on the drug charges. Despite Officer Stines's threats, Ms. Sewell reported the assault to the State's Attorney the next day. Officer Stines was arrested, confessed to the crime, and was convicted and imprisoned. (R5:106; 90-93, 109-110, 135-136)

2. Officer Stines's Assault On Sharon Washington.

At approximately 2:15 a.m., May 13, 1991, one hour and fifteen minutes before Officer Stines and Heather Sewell arrived at the Lake Hamilton police station, Officer Stines stopped a woman named Sharon Washington. Officer Stines ordered Ms. Washington out of her car and stated that he needed to search her because "sometimes women carry weapons on them." Officer Stines then "searched Ms. Washington by touching her breasts and between her legs, while she faced him." After the search, Officer Stines commented to Ms. Washington that many women offer him "their bodies in order not to write them tickets." Receiving no such offer, Officer Stines issued Ms. Washington a ticket for speeding. (R5:108; 3-9)

Ms. Washington drove home and advised her boyfriend of the assault by Officer Stines. Her boyfriend became extremely upset and immediately called the Lake Hamilton police department. Because Lake Hamilton's police station was empty, the call was routed to Lake Hamilton's borrowed dispatcher in a neighboring town,

who received the call at 3:11 a.m., almost twenty minutes before Officer Stines arrived at the police station with Ms. Sewell and close to an hour before his assault on her. Ms. Washington's boyfriend told the dispatcher that a Lake Hamilton police officer, badge number 204, had molested Ms. Washington. The boyfriend demanded to speak "to the police chief, whoever was in charge." The dispatcher was confused and did not know what to do, because Lake Hamilton had given her no instruction about what to do in such a circumstance. Lacking any policy or guidance from Lake Hamilton, the dispatcher told Ms. Washington's boyfriend that the chief was not on duty and to try again during normal business hours. As a result, Lake Hamilton's police chief did not learn until the next day that the nighttime dispatcher had received a complaint against Officer Stines for sexual misconduct almost one hour before Officer Stines assaulted Ms. Sewell. (R5:108; 9-14; R5:106; 151-158)

3. Lake Hamilton's Policies, Customs, And Procedures.

As of May 13, 1991, the policymaker for Lake Hamilton's police department was Chief Freeman. Chief Freeman had been responsible for formulating and implementing policies and customs governing Lake Hamilton's police department since he became police chief in 1985. Lake Hamilton had no written policies or procedures governing any aspect of police work and no written or oral policies or procedures regarding sexual harassment of suspects (or anyone). Chief Freeman admitted knowing that Lake Hamilton needed written policies and procedures, but that he neglected that need. He testified that, although he had intended to prepare and implement written policies, he simply had not "gotten around to it" during his first six years as Lake

Hamilton's police chief. (R5:108; 41, 82-83, 129-130, 132, 140; R5:109; 46)

Ms. Sewell presented expert testimony that standard practice is for police departments to have written guidelines, policies, and procedures. Even Lake Hamilton's expert on police procedures admitted: "They should have had written policies. There really is no reason not to." (R5:109; 43, 148)

Although the evidence at trial was unanimous that rookie police recruits need formal field training beyond what is taught at the police academy, Lake Hamilton had no formal program for training its officers. Chief Freeman was aware of formal field officer training programs, which typically last three to six months and provide rookie recruits with systematic training and practical guidance on how to handle real life situations. Nonetheless, Chief Freeman instituted no such training for Lake Hamilton's police department during his six years as the chief. (R5:108; 25, 55-56; R5:109; 63-64, 176-177)

Chief Freeman hired Officer Stines from the police academy in November, 1990, seven months before Officer Stines assaulted Ms. Sewell. Officer Stines's "training" consisted of "riding around" Lake Hamilton with other police officers for two weeks. Because there was no formal training program, what Officer Stines had the opportunity to learn was fortuitous, depending on what situations he encountered. Significantly, neither Officer Stines nor any other Lake Hamilton police officer received any training or guidance in sexual harassment, frisking of female suspects, procedure for arresting and detaining female suspects, and the like. (R2: 56; 4-6; R5:108; 125)

Lake Hamilton had no policy or procedure regarding the treatment of female suspects by its all male police force. Lake Hamilton police officers testified that the town lacked any policy, oral or written, concerning proper procedure for frisking a female suspect, proper

procedure for detaining and transporting a female suspect to an unoccupied police station house, guidelines under which strip searches were appropriate, or whether a lone male police officer should request backup to join him at the station when transporting a woman there late at night. As stated previously, Lake Hamilton had no policy regarding sexual harassment. Instead, Lake Hamilton's police officers were governed solely by their own discretion. (R5:108; 28, 33-36, 66, 69-70, 159, 167-169, 174-175, 180)

In addition to having no written policies on police procedure, no written or oral policies on sexual harassment or treatment of female suspects, and no formal training for new officers, Chief Freeman admitted that Lake Hamilton violated Florida law by failing to implement and maintain a policy or system for receiving, investigating, and determining citizen complaints lodged against police officers.[1] Chief Freeman testified that he had received between "a dozen and two dozen" complaints against Lake Hamilton police officers during his tenure as police chief, but he could not be specific because the Police Department had never documented any of the complaints. (R5:108; 181-184)

Lake Hamilton maintained a custom of staffing its midnight shift with one male police officer. The officer working the midnight shift was not supervised, directly or indirectly. Instead, Lake Hamilton's policy in May of 1991 was for the lone male police officer on duty during the midnight shift to "supervise himself." The policy applied to rookie officers like Officer Stines. (R5:108; 169-172, 180-181)

Lake Hamilton also had a policy as of May, 1991, to leave its police station unmanned during the midnight

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[1] Section 112.533, *Florida Statutes*, required Lake Hamilton to have such a system.

shift. Rather than place a dispatcher in its own police station at night, Lake Hamilton used a dispatcher located in a neighboring town. Lake Hamilton had no policy, procedures, or guidelines governing the circumstances under which the night dispatcher should contact the chief of police or next-ranking officer in the event of a citizen complaint of misconduct by the lone officer on duty. As a result, before Ms. Sewell's assault by Officer Stines, Lake Hamilton provided no guidance, instruction, or procedure – oral or written – to the borrowed dispatcher as to what to do upon receiving a complaint of misconduct. (R2:56; 8-9; R5:108; 161-162, 174)

Chief Freeman, the policymaker for the Lake Hamilton police force, testified that he maintained his custom of employing an unsupervised, male police officer on the midnight shift despite the risk that, under those circumstances, a police officer might sexually molest a woman, which is precisely what happened in this case. Chief Freeman testified in his deposition:

> Q: I'd like to ask you if you were aware prior to May 13th, 1991 of any risks or dangers associated with allowing a lone or sole male police officer to detain a female person? You have just one male police officer and a female person, is there any danger with that?
>
> A: I guess there could be. Yes sir.
>
> Q: Were you aware of those dangers before May 13th, 1991?
>
> A: Yes sir.
>
> Q: What are some of those dangers?
>
> A: I guess there could be any danger. I mean, in reference to this one with Officer Stines, the officer taking advantage of a prisoner while being under arrest.

(R5:108; 207) Chief Freeman also testified at trial:

> Q: Despite the fact that you knew of the risk of a sexual assault by a lone male police officer to a

woman like Heather Sewell, that a risk was created by all those policies you just described you still allowed those policies to exist in the Town of Lake Hamilton, didn't you?

A: Yes sir.

(R5:108; 209)

4. The Link Between Lake Hamilton's Policies, Customs, And Procedures And Officer Stines's Assault On Heather Sewell.

Ms. Sewell proved that Lake Hamilton's policies and customs were the moving force behind Officer Stines's assault in three different ways. First, Ms. Sewell presented evidence of the link between inadequate training and the assault. Dennis Waller, Ms. Sewell's police procedures expert, testified that Lake Hamilton's police policies and procedures were entirely inadequate. He testified that, if Lake Hamilton had implemented adequate written policies and procedures governing the authority, discretion, and discipline of police officers, Officer Stines's harassment and molestation of Ms. Sewell "never would have happened." Officer Stines testified that his improper conduct would have been prevented by "a standardized set of policies and procedures." (R2:56; 11; R5:108; 125; R5:109; 42-45, 52-59, 63-73).

Secondly, proper supervision would have prevented Officer Stines's assault on Ms. Sewell. In addition to the testimony from Ms. Sewell's police expert, Officer Stines testified to the obvious – that the presence of another Lake Hamilton police officer on the midnight shift would have made his improper conduct "less likely." He testified that he would have been deterred from his actions by the presence of any other employee at the police station. (R2:56; 10-11; R5:108; 125).

Lake Hamilton's inadequate training and supervision, however, was not the sole cause of this assault. The

third causal link was Lake Hamilton's failure to have any policy or procedure regarding complaints received from the nighttime dispatcher. Ms. Sewell's expert, Mr. Waller, testified that if Lake Hamilton had properly instructed its dispatcher to immediately call the police chief upon receiving a citizen complaint of misconduct by the sole officer on duty during the nightshift, Ms. Sewell would not have been molested. In unrebutted testimony, Mr. Waller testified that a dispatcher call reporting the assault on Sharon Washington to Chief Freeman should have prompted Chief Freeman to immediately contact Officer Stines via radio. This radio inquiry would have occurred before Officer Stines transported Ms. Sewell to the unoccupied Lake Hamilton police station. Mr. Waller testified that, if such a radio inquiry had been made, "Heather Sewell would not have been assaulted." (R5:109; 70-71)

REASONS FOR GRANTING THE PETITION

This Court recently addressed municipal liability under 42 U.S.C. §1983 in *Board of the County Commissioners of Bryan County, Oklahoma v. Brown*, 520 U.S. ___, 137 L.Ed.2d 626, 117 S.Ct. ___ (1997). In separate dissents, Justice Souter and Justice Breyer each recognized that this area of the law is unsettled, highly complex, and difficult to apply and, joined by Justices Stevens and Ginsburg, called for a reexamination of *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 56 L.Ed.2d 611, 98 S.Ct. 2018 (1978). Justice Breyer concluded his dissent:

> Nonetheless, for the reasons I have set forth, I believe the case for reexamination is a strong one. Today's decision underscores this need. Consequently, I would ask for further argument that would focus upon the continued viability of *Monell's* distinction between vicarious municipal liability and municipal liability based upon policy and custom.

520 U.S. at ___, 137 L.Ed.2d at 660. Justice Souter similarly observed:

> Despite arguments that *Monell's* policy requirement was an erroneous reading of §1983 . . . , I had not previously thought that there was sufficient reason to unsettle the precedent of *Monell*. Now it turns out, however, that *Monell* is hardly settled. That being so, Justice Breyer's powerful call to reexamine §1983 municipal liability afresh finds support in the Court's own readiness to rethink the matter.

520 U.S. at ___, 137 L.Ed.2d at 656.

The opinion on review is a compelling example of the complexity and confusion in the area of §1983 law. In reversing the District Court's judgment, the Eleventh Circuit ignored its own precedent, rendered a holding inconsistent with precedent from this Court and that of other circuits, and relied on an undefinable legal test that is impossible to apply in any consistent manner.

The Eleventh Circuit's decision in this case is erroneous. The standard of municipal liability under 42 U.S.C. §1983 is an important question. This case presents the Court with a timely opportunity to review and clarify the law governing this important subject.

I. The Standard For Municipal Liability Under §1983.

In *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 56 L.Ed.2d 611, 98 S.Ct. 2018 (1978), the Court held that municipalities are liable for constitutional torts only when the execution of a municipal policy or custom inflicts the injury. In *City of Canton v. Harris*, 489 U.S. 378, 103 L.Ed.2d 412, 109 S.Ct. 1197 (1989), the Court held that a plaintiff asserting municipal liability on the theory that a facially lawful municipal action has caused injury must demonstrate that the municipal action was taken with "deliberate indifference" to its known or obvious consequences. The plaintiff must further establish that the

municipal policy or custom was the "moving force" behind the injury. In *Board of the County Commissioners of Bryan County, Oklahoma v. Brown*, 520 U.S. ___, 137 L.Ed.2d 626, 117 S.Ct. ___ (1997), the Court emphasized that "deliberate indifference" is "a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." 520 U.S. at ___, 137 L.Ed.2d at 643. In *Pembaur v. Cincinnati*, 475 U.S. 469, 89 L.Ed.2d 452, 106 S.Ct. 1292 (1986), the Court recognized that a single incident can be sufficient as the basis for municipality liability, so long as the other elements of §1983 liability are present.

Municipal policy is created by "a decision-maker possess[ing] final authority to establish municipal policy with respect to the action ordered." *Pembaur*, 75 U.S. at 481, 89 L.Ed.2d at 464. A custom is defined as "persistent and widespread . . . practices . . . of officials" and exists for §1983 purposes if it is a daily occurrence or the common and routine practice of the town. *Monell*, 463 U.S. at 658. The absence of adequate policies and procedures constitutes a custom – or a policy itself – that also gives rise to municipal liability. In *Canton*, the Court recognized that a policy or custom of inadequate training or supervision can create liability. *See, also, Vineyard v. County of Murray*, 990 F.2d 1207 (11th Cir.), *cert. denied*, 126 L.Ed.2d 594, 114 S.Ct. 636 (1993). Where a situation obviously calls for procedures, rules, or regulations, a municipality's failure to make policy is equally actionable. *See, generally, Anderson v. City of Atlanta*, 778 F.2d 678 (11th Cir. 1985); *Avery v. County of Burke*, 660 F.2d 111 (4th Cir. 1981); *Murray v. City of Chicago*, 634 F.2d 365 (7th Cir. 1981), *cert. dismissed*, 456 U.S. 604, 72 L.Ed.2d 366, 102 S.Ct. 2226 (1982).

As defined by this Court in *County Commissioners of Bryan County*:

> We have, finally, identified a municipal policy in a third situation, even where the policymaker has failed to act affirmatively at all, so long as the need to take some action to control the agents of the Government "is so obvious, in the inadequacy [of existing practice] so likely to result in the violation of constitutional rights, that the policy make[r] . . . can reasonably be said to have been deliberately indifferent to the need." (Citation omitted)

137 L.Ed.2d at 648. Deliberate indifference can be shown as a result of notice of prior actions by subordinate officers or:

> Such a policy choice may be inferred even without a pattern of acts by subordinate officers, so long as the need for action by the policymaker is so obvious that the failure to act rises to deliberate indifference.

Id. at 648.

The final element of §1983 liability is "the link between the policymaker's inadequate decision and the particular injury alleged." *Id.* at 643. As explained by Justice Souter:

> But that is simply to say that the tortious act must be proximately caused by the policymaker. The policy requirement is the restriction that bars straight forward *respondeat superior* liability, and the need to "test the link" is merely the need to apply the law that defines what a cognizable link is.

County Commissioners of Bryan County, 520 U.S. at ___, 137 L.Ed.2d at 653, J. Souter dissenting.

II. The Eleventh Circuit's Opinion Conflicts With Its Prior Opinion In *Vineyard v. County of Murray, Georgia.*

On appeal below, Ms. Sewell argued that this case is governed by *Vineyard v. County of Murray*, 990 F.2d 1207 (11th Cir.), *cert. denied*, 126 L.Ed.2d 594, 114 S.Ct. 636 (1993). In *Vineyard*, an arrestee in a domestic dispute was hospitalized for injuries he sustained during the dispute. When sheriff's deputies arrived at the hospital, they handcuffed him to a bed in the emergency room. 990 F.2d at 1209. Fearful of a suicide attempt, the deputies and hospital personnel attempted to forcibly empty Vineyard's stomach by making him drink a substance that would make him vomit. When he refused, the deputies made the hospital personnel to leave the room and proceeded to beat Vineyard in the head and chest while he was handcuffed to his hospital bed. *Id.* at 1209.

Vineyard sued the county for §1983 municipal liability, alleging inadequate policies for training, supervision, and discipline of its deputies. One of the cited deficiencies was that "the dispatcher or whoever answers the phone had discretion about the initial handling of the complaint." Additionally, the department failed to keep a log of citizen complaints and lacked any written policies and procedures.

After a jury returned a verdict in Vineyard's favor, the county appealed the denial of its motion for directed verdict. The Eleventh Circuit affirmed the denial of the directed verdict, recognizing that the failure to train, supervise, and discipline constitutes official "policies or customs of the local police department." 990 F.2d at 1211-1212. Applying this Court's holding in *Canton*, the Eleventh Circuit found that substantial evidence supported the jury's conclusion that the county acted in deliberate indifference to the rights of its citizens and that

the county's policies were the moving force behind the constitutional deprivation.

The proof presented in this case parallels the evidence in *Vineyard*. In each case, the failure to establish policy or the tolerance of an inadequate procedure constituted the municipal "policy or custom" for purposes of §1983 liability. In this case, Ms. Sewell proved that Lake Hamilton had adopted policies or maintained customs of abdicating control by:

> 1. Failing to implement any written policies or procedures governing the authority or discretion of its police officers;
>
> 2. Failing to adequately train rookie recruits;
>
> 3. Violating Florida law by failing to implement and maintain a policy or system regarding the receipt, investigation, and determination of citizen complaints against police officers;
>
> 4. Staffing its midnight shift with a lone male police officer (in this case, an inadequately trained rookie officer);
>
> 5. Maintaining a policy of not supervising the lone male police officer working the midnight shift;
>
> 6. Failing to implement or enforce any policies or procedures regarding the treatment of female suspects by lone male police officers;
>
> 7. Failing to implement or enforce any policies regarding sexual harassment of suspects, detainees, or any other persons; and
>
> 8. Maintaining a policy of not supervising, instructing, or training the borrowed, nighttime dispatcher regarding how to handle or respond to citizen complaints of police misconduct.

Ms. Sewell proved that Chief Freeman maintained these inadequate policies with deliberate indifference toward the rights of his constituents. This proof came

from Chief Freeman himself, who candidly acknowledged that his policies created the risk of a police officer assaulting a female suspect. **It is difficult to imagine direct evidence of deliberate indifference more compelling than the following admission by Chief Freeman:**

> Q: Despite the fact that you knew of the risk of a sexual assault by a lone male police officer to a woman like Heather Sewell, that a risk was created by all those policies you just described you still allowed those policies to exist in the Town of Lake Hamilton, didn't you?
>
> A: Yes sir.

Finally, Ms. Sewell proved that Lake Hamilton's policies and customs proximately caused her injury. Both expert testimony and the testimony of Officer Stines established that Officer Stines's assault on Heather Sewell would not have occurred had Lake Hamilton maintained appropriate policies and procedures for training, supervision, and processing of complaints.

Although Ms. Sewell presented substantial evidence to support the jury's verdict that she established all the elements of §1983 municipal liability in accordance with *Vineyard*, which is consistent with this Court's precedents, the Eleventh Circuit ignored its prior opinion in *Vineyard* and ignored most of the evidence as well. Although the appellate briefs discussed *Vineyard* in detail, the Eleventh Circuit did not cite *Vineyard*. Instead, the court relied on the following language from *Walker v. City of New York*, 974 F.2d 293 (2d Cir. 1992), *cert. denied*, 507 U.S. 972, 113 S.Ct. 1412, 122 L.Ed.2d 784 (1993):

> It is not enough to show that a situation will arise and that taking the wrong course in that situation will result in injuries to citizens. . . . *City of Canton* also requires a likelihood that the failure to train or supervise will result in the officer making the wrong decision. Where the proper response . . . is obvious to all without

> training or supervision, then the failure to train or supervise is generally not "so likely" to produce a wrong decision as to support an inference of deliberate indifference by city policymakers to the need to train or supervise.

117 F.3d at 490, quoting *Walker*, 974 F.2d at 299-300.

The Eleventh Circuit's holding in this case conflicts squarely with *Vineyard*. The implication of the holding is that a police officer's abuse of his authority to sexually harass and assault a woman is so obviously wrong that no amount of training or supervision can prevent the wrong. That holding directly ignores the evidence in the case from Chief Freeman, Ms. Sewell's expert witness, and Officer Stines himself.

The opinion below cannot be reconciled with *Vineyard*. Is it not "obviously wrong" to savagely beat a sick arrestee while he is handcuffed to a hospital bed? On appeal below, Lake Hamilton argued that *Vineyard* was simply an excessive force case and that, because some level of police force is expected and necessary, it is necessary to train against the use of excessive force. That argument may apply to some cases, but not to *Vineyard*. A bright line exists between a difficult decision made in the heat of action between two levels of force, on the one hand, and a wrong decision made, where there is no threat to an officer's safety, to beat a sick man handcuffed to a bed.[2]

Because of the great importance of the question of municipal liability, and because of the confusing, complex status of the law in that area, the conflict between the

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[2] Ironically, the Eleventh Circuit's reasoning would result in Lake Hamilton being liable for Officer Stines's improper frisking of Sharon Washington, but not liable for his assault on Heather Sewell. After all, frisking is an expected and necessary part of police work, while sexual harassment and assault are not.

Eleventh Circuit's decision below and its decision in *Vineyard* warrants the exercise of this Court's jurisdiction. *See, e.g., John Hancock Mutual Life Ins. Co. v. Bartels*, 308 U.S. 180, 84 L.Ed. 176, 60 S.Ct. 221 (1939).

III. The "Obviously Wrong" Test Is Wrong.

A. The Test Is Legally Wrong.

The *Walker* opinion articulates a three-part test for §1983 municipal liability that conforms to this Court's precedents, but then proceeds to engraft an exception to that liability. The exception described in *Walker*, and expressly adopted by the Eleventh Circuit below, is that when the proper response by a municipal employee to a certain situation is so obvious that the failure to train or supervise would not have made a difference, the municipality is not liable. This exception misinterprets *City of Canton*. In *City of Canton*, the Court held that to prove deliberate indifference, the plaintiff must show that the need for more or better supervision to protect against constitutional violations was obvious. The test under *Canton* is thus not whether the employee's conduct is obviously wrong, but whether the need for additional or different training or supervision is "obvious" in view of the duties assigned to police officers and the situations officers will confront.

Ms. Sewell proved at trial that Lake Hamilton's inadequate training and supervision was not only likely to cause a wrong decision, but in fact, caused Officer Stines to commit his assault. Even without Chief Freeman's candid acknowledgment of the risk created by his failure to implement any policy, common sense commands that the need to train and supervise a rookie, male police officer working a midnight shift alone in the proper treatment and detention of a female suspect is obvious.

The test articulated in *Canton* is a traditional test of causation, readily susceptible to interpretation and application. On the other hand, the test applied below is unintelligible, undefinable, and irreconcilable with prior precedent. Referring to *Vineyard*, can it reasonably be posited that the decision to beat an unarmed, ill arrestee handcuffed to a hospital bed is not obviously wrong, but the decision to abuse one's authority in exchange for sexual favors is? Moreover, what is obviously wrong to some is not obviously wrong to others. Undoubtedly, a formulation of "obviously wrong" conduct will be subjective and will vary from case to case and from employee to employee.

Perhaps the most troubling aspect of the opinion below is that it ignores factual causation and traditional notions of legal causation and substitutes a backwards causation analysis that depends on the nature of the employee's conduct. **Under this test, if the employee's conduct is egregious enough, the court concludes not just that there is no causation, but that there is no municipal fault to begin with.** The fallacy of this approach is readily observable. As discussed previously, a plaintiff must prove:

1. A municipal "policy or custom";
2. That the policy was maintained with "deliberate indifference" towards the constitutional rights of persons such as the plaintiff; and
3. That the policy or custom was the "moving force" behind the plaintiff's injury.

Elements 1 and 2 will always exist independently of and, in most instances, before element 3. **In other words, if a municipality maintains a certain policy or custom with deliberate indifference, the municipal conduct – or fault – will exist independently of and, usually, before the employee's conduct that produces the injury.**

In the opinion below, the Court reversed these elements and examined the employee's conduct to determine whether Lake Hamilton's policies and customs were maintained with deliberate indifference. That test defies logic as well as the evidence. Ms. Sewell proved to the Judge and Jury's satisfaction that Lake Hamilton maintained the policies and customs enumerated and discussed in this petition. Ms. Sewell also established through Chief Freeman's own testimony that those policies or customs were maintained with deliberate indifference because Chief Freeman knew the city's policies created the risk of a lone male police officer sexually assaulting a female suspect. The Eleventh Circuit ignored that proof and, instead, looked at the nature of Officer Stines's conduct to perform an after the fact evaluation of whether Lake Hamilton's policies were maintained with deliberate indifference. Because of the Court's conclusion that Officer Stines's behavior was so obviously wrong that training or supervision could not have prevented it, the Court then concluded that the policies were not maintained with deliberate indifference. This test places the horse after the cart and then, depending on the nature of the cart, determines whether the horse exists at all.

On appeal below, Lake Hamilton argued a distinction between sexual assault and the use of excessive force. That argument, however, proves the fallacy of the logic used below. There is no doubt that, in view of Lake Hamilton's abysmal failure to train, supervise, or instruct officers in many important matters, that if Officer Stines had used excessive force on Heather Sewell, a §1983 violation would exist. However, because Officer Stines, instead of using excessive force, abused his position of authority to force Ms. Sewell into sexual submissiveness, no violation exists. That reasoning produces the absurd result that the more egregious the employee's conduct, the more likely the exoneration of the municipality, despite the fact that the municipality was at fault.

B. The Obviously Wrong Test Is Factually Wrong.

The Eleventh Circuit concluded as a matter of fact – and in defiance of the evidence in this case – that the decision by an untrained, rookie, male police officer not to sexually harass and then molest a female suspect should be so obvious that it cannot possibly be affected by proper training or supervision. That is a startling conclusion indeed in today's society.

Congress and State Legislatures have determined that laws are necessary to define appropriate sexual behavior. The Equal Employment Opportunity Commission requires that employers post conspicuous notices and implement exacting policies and guidelines regarding appropriate sexual behavior. Our military is plagued by improper conduct between the sexes. Social, political, and religious leaders debate appropriate sexual behavior. Some say that men "just don't get it." Yet the Eleventh Circuit, without evidence or elaboration, concluded that appropriate sexual behavior for an untrained, rookie officer is so obvious that no training or supervision is necessary.

Federal courts have struggled with §1983 cases involving sexual misconduct. In *Scott v. Moore*, 114 F.3d 51 (5th Cir. 1997), the court found no liability based on the sexual assault of a pretrial detainee in prison, because (1) there was no history of misconduct to put the governmental agency on notice of the risk and (2) the city had significant policies and procedures in place that had prevented such misconduct for more than twenty years. 114 F.3d at 54-55. In a spirited dissent, Circuit Judge Wisdom explained the difficulty faced by courts in cases involving sexual misconduct:

> Today, a majority of this Court sitting en banc concluded that the sexual assault of a pretrial detainee at the hands of an unsupervised male guard does not justify even the development of

> a record in the District Court. I cannot concur in such a result. . . .
>
> [In a previous appeal in the same case], we concluded that this case had identified a developing issue; the same issue that is illustrated by the explosion of sexual harassment cases in this country, and by the problems encountered in the military of late. **The issue concerns the realities of human nature in situations where one individual occupies a position of substantial authority relative to another. The situations or, more accurately, relationships are myriad: supervisor to employee, military officer to soldier, guard to pretrial detainee. Whatever the relationship, it is abundantly clear that our society is beginning to recognize these as potentially volatile situations.** (footnotes omitted, emphasis added)

114 F.3d at 55-56. In this case, Chief Freeman knew he had a volatile situation, but deliberately chose not to act.

Other cases illustrate this difficult issue as well. *See, e.g., Haberthur v. City of Raymore, Missouri*, 119 F.3d 720 (8th Cir. 1997) (reversing the dismissal of a §1983 complaint based on a police officer's sexual harassment and sexual assault of a citizen); *Swain v. Spinney*, 117 F.3d 1 (1st Cir. 1997) (affirming a summary judgment for defendant in a §1983 claim based on inadequate training in connection with strip search of a female arrestee; no prior incidents *and* sufficient policies in place); *West v. Waymire*, 114 F.3d 646 (7th Cir. 1997) (affirming summary judgment for defendant based on police officer's sexual molestation of 13 year old girl; risk that police officer was a "child molester" not obvious to policymaker).

IV. The Eleventh Circuit's Opinion Conflicts With This Court's Opinion in *City of Canton v. Harris*

In *City of Canton v. Harris*, 489 U.S. 378, 103 L. Ed. 2d 412, 109 S.Ct. 1197 (1989), this Court recognized that the failure to train and supervise can be the basis for municipal liability under §1983. In *Canton*, the Court established a three-part test for §1983 liability based on a claim of failure to train and supervise:

> 1. The policymaker must know "to a moral certainty" that employees will confront a given situation.
>
> 2. The situation must either present the employee with a difficult choice of the sort that training or supervision will make less difficult or that there is a history of employees mishandling the situation.
>
> 3. The Plaintiff must show that the wrong choice by the City employee will frequently cause the deprivation of a citizens constitutional rights.

City of Canton, 489 U.S. at 390-391, 103 L. Ed 2d at 427-428; *see also, Walker v. City of New York*, 974 F.2d at 297-298.

In this case, Ms. Sewell established that Chief Freeman knew to a moral certainty that a lone male police officer working the midnight shift would confront female suspects. That such a situation will occur is obvious. Regarding the second prong of the test, *Walker* provides one example of a difficult choice as whether to use deadly force in apprehending a fleeing suspect because "more than the application of common sense is required." 974 F.2d at 297. However, *Walker* defines another "difficult choice" as follows:

> **A choice might also be difficult where, although the proper choice is clear, the employee has powerful incentives to make the wrong choice. (emphasis supplied)**

974 F.2d at 297. That definition applies here. A male police officer in a position of authority, when faced with a female suspect who offers sexual favors in exchange for release or when faced with the temptation to elicit sex in exchange for release, should certainly know the proper course. However, history and human nature tell all that the officer will have a powerful incentive to make the wrong choice. Ms. Sewell presented evidence that training would have made Officer Stines's choice less difficult and that supervision would have made the wrong choice impossible.[3]

Finally, as to the third prong, a wrong choice of the type in this case will always cause the deprivation of a citizen's constitutional rights. Without question, the three-part test established in *Canton* and recognized in *Walker*, applied to the facts of this case, results in §1983 liability.[4]

V. The Court Should Reconsider *Monell*.

As stated above, in separate dissents in *County Commissioners of Bryan County*, four of this Court's justices advocated the revisitation and, perhaps, overruling of this Court's decision in *Monell*. Because *Monell* has produced a complex and inconsistent body of law that causes

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[3] It is essential that the Court bear in mind that while this case is a failure to train and supervise case in part, it also involves Lake Hamilton's other policies of keeping the police station unmanned and failing to provide any instructions to the dispatcher. The evidence established that those policies caused Officer Stines to commit his assault. The Eleventh Circuit completely ignored that aspect of the case in reversing the judgment.

[4] But for the "obviously wrong" exception to §1983 liability, as discussed above, *Walker v. City of New York*, provides an excellent analysis of §1983 liability based on inadequate training and supervision.

nonsensical results such as the one below, the Court should accept the four justices' suggestion that it is time to reconsider *Monell*. As stated by Justice Breyer in his dissent:

> The majority fears that a contrary view of prior precedent would undermine *Monell's* basic distinction [between respondeat superior liability and liability based on custom or policy]. That concern, however, rather than leading us to spin ever finer distinctions as we try to apply *Monell's* basic distinction between liability that rests upon policy and liability that is vicarious, suggests that we should reexamine the legal soundness of that basic distinction itself.

137 L.Ed.2d at 656.

Justice Stevens argued cogently against *Monell's* distinction in dissenting and concurring opinions in *Oklahoma City v. Tuttle*, 471 U.S. 808, 85 L.Ed.2d 791, 105 S.Ct. 2427 (1985) and *Pembaur v. Cincinatti*, 475 U.S. 469, 89 L.Ed.2d 452, 106 S.Ct. 1292 (1986). This case is illustrative of the frustration expressed by Justice Stevens in his concurring opinion in *Pembaur*:

> This is not a hard case. If there is any difficulty, it arises from the problem of obtaining a consensus on the meaning of the word "policy" – a word that does not appear in the text of 42 U.S.C. §1983, the statutory provision that we are suppose to be construing. The difficulty is thus a consequence of this Court's lawmaking efforts rather than the work of the Congress of the United States.

475 U.S. at 487, 89 L.Ed.2d at 467-468.

Likewise, this is not a hard case. Lake Hamilton hired a rookie police officer and provided him no training or instruction of any nature on the arrest, detention, or treatment of female suspects. Contrary to accepted custom in police departments throughout the country, Lake

Hamilton had no written policies, procedures, rules, instructions, or guidelines regarding any aspect of police work. **Amazingly, Lake Hamilton had no policy, oral or written, regarding sexual harassment.** Lake Hamilton allowed its untrained, unsupervised male officer to work a midnight shift alone. Lake Hamilton had no provision in place for citizen complaints about the officer in the middle of the night. Lake Hamilton had no policy or procedure governing how the nighttime dispatcher should handle and respond to a citizen complaint of serious misconduct in the middle of the night while the complained-of officer remained on duty and unsupervised. Lake Hamilton's chief policymaker knew that this set of circumstances created the risk of a police officer assaulting a female suspect, but maintained the policies and procedures nonetheless. As a direct result, Heather Sewell was sexually harassed and assaulted on the floor of the police station – the very building that should represent safety to the citizens of Lake Hamilton.

The introduction to Justice Stevens's dissent in *Oklahoma City v. Tuttle*, graphically illustrates the injustice of the opinion below:

> When a police officer is engaged in the performance of his official duties, he is entrusted with civic responsibilities of the highest order. His mission is to protect the life, the liberty, and the property of the citizenry. If he violates the Federal Constitution while he is performing that mission, I believe that federal law provides the citizen with a remedy against his employer as well as a remedy against him as an individual. This conclusion is supported by the text of 42 U.S.C. §1983, by its legislative history, and by the holdings and reasoning in several of our major cases construing the statute. The Court's contrary conclusion rests on nothing more than

> a recent judicial fiat that no litigant had asked the Court to decree.

471 U.S. at 834, 85 L.Ed.2d at 811.

Applying the language of 42 U.S.C. §1983 to the facts of this case should not be difficult. This is the very type of wrong that Congress intended to prevent. However, the injustice engendered by the unsupportable opinion below is a product of the "highly complex body of interpretive law" produced by *Monell*. *See County Commissioners of Bryan County*, 137 L.Ed.2d at 656 (J. Breyer, dissenting).

It seems inescapable to conclude that the current state of §1983 law has become too difficult to apply with any consistency. Municipalities cannot predict or understand their liability. Citizens cannot know their rights. Courts cannot consistently and justly adjudicate. As stated by Justice Stevens in *Pembaur*:

> In other words, as I explained in my dissent in *Oklahoma City v. Tuttle*, 471 U.S. 808, 835-840, 85 L.Ed.2d 791, 105 S.Ct. 2427 (1985), both the broad remedial purpose of the statute and the fact that it embodied contemporaneous common-law doctrine, including *respondeat superior*, require a conclusion that Congress intended that a governmental entity be liable for the constitutional deprivations committed by its agents in the course of their duties.

475 U.S. at 489, 89 L.Ed.2d 469, J. Stevens, dissenting.

The Court should grant this petition and hear argument on the continued viability of *Monell's* distinction between vicarious municipal liability and municipal liability based upon policy and custom. The Court might determine that a revisitation of §1983 and the current, untenable nature of the body of §1983 law since *Monell* requires an overruling of *Monell* and a rule of strict vicarious municipal liability. The Court might determine

that liability based upon policy and custom is appropriate, but use this opportunity to clarify the test and eliminate inconsistent and unjust results such as that reached by the Court of Appeals below. The Court might fashion a new rule, somewhere in between, that can be applied fairly, consistently, and predictably and that will better serve Congress's intent in enacting §1983. For example, the facts of this case would certainly justify a rule that if a municipality maintains customs or policies with deliberate indifference toward any foreseeable harm, the municipality is liable for any harm that has a causal relation to the policy or custom. Such a standard is not strict vicarious liability. At the same time, such a standard would eliminate the complexity and confusion characterized thus far by §1983 jurisprudence as the courts grapple to determine 1983 liability, but struggle to avoid *Monell's* proscription of pure vicarious liability.

Justice Breyer concluded his dissent in *County Commissioners of Bryan County* as follows:

> Nonetheless, for the reasons I have set forth, I believe the case for reexamination is a strong one. Today's decision underscores this need. Consequently, I would ask for further argument that would focus upon the continued viability of *Monell's* distinction between vicarious municipal liability and municipal liability based upon policy and custom.

520 U.S. at ___, 137 L.Ed.2d at 660. This case presents the Court a timely and appropriate opportunity to entertain further argument on this fundamentally important question.

CONCLUSION

For the foregoing reasons, the Court should grant the petition.

Respectfully submitted,

JOSEPH H. VARNER
Counsel of Record
CURTIS ALEXANDER & VARNER
Post Office Box 189
Winter Haven, Florida 33882-0189
(941) 297-5111

and

MICHAEL S. HOOKER
GLENN RASMUSSEN & FOGARTY, P.A.
Post Office Box 3333
Tampa, Florida 33601-3333
(813) 229-3333

Attorneys for Heather Ann Sewell, Petitioner

App. 1

Heather Ann SEWELL,
Plaintiff-Appellee,

v.

TOWN OF LAKE HAMILTON,
Defendant-Appellant.

No. 95-2867.

United States Court of Appeals,
Eleventh Circuit.

July 21, 1997.

Arrestee sued town under § 1983, alleging that police officer's alleged sexual molestation of arrestee resulted from failure to train or supervise. The United States District Court for the Middle District of Florida, No. 93-2037-CIV-T-25A, Henry Lee Adams, Jr., J., entered judgment on jury verdict for arrestee. Town appealed. The Court of Appeals, Dubina, Circuit Judge, held that officer's proper response to situation would have been obvious to all without training or supervision.

Reversed and remanded.

D. Andrew DeBevoise, Sophia B. Ehringer, Bobo, Spicer, Ciotoli, Fulford, Bocchino, DeBevoise & LeClainche, Orlando, FL, for Defendant-Appellant.

Richard E. Fee, Michael S. Hooker, Tampa, FL, for Plaintiff-Appellee.

Appeal from the United States District Court for the Middle District of Florida.

Before TJOFLAT, DUBINA and CARNES, Circuit Judges.

DUBINA, Circuit Judge:

Appellant Town of Lake Hamilton ("the Town") appeals from a judgment entered on a jury verdict against it for violations of Appellee Heather Sewell's ("Sewell") constitutional rights. For the reasons that follow, we reverse.

BACKGROUND FACTS

At approximately 3:00 a.m. on May 13, 1991, Paul Stines ("Stines"), an officer with the Town's police department, stopped Sewell, a 22-year old female, for speeding. Stines searched Sewell's car, with her consent, and found an illegal duplicate driver's license and a bag of marijuana.[1] Stines had Sewell follow him to the police station, where they arrived at 3:30 a.m. Realizing they were alone at the station, Sewell became hysterical and believed that Stines was going to rape her. Stines issued a ticket to Sewell. Stines then offered to let her go on the drug charge if she consented to a strip search. Sewell consented to a strip search by a female officer but Stines refused. Stines persisted in his threats to "ruin her life" with the drug charge unless she submitted to a strip search by him. He also indicated that he would accept any sexual advances made by her during the strip search. Eventually, Sewell undressed and lay naked on the floor

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[1] It appears, although it is not clear from the record, that Stines planted the marijuana in the car. The marijuana was found later in Stines' locker.

as instructed. Stines molested her but no sexual intercourse took place. Stines then permitted Sewell to dress and leave the police station. Sewell reported the incident to the State Attorney's office the next morning.

Earlier that same morning, Stines had stopped a 20-year old woman, Sharon Washington ("Washington"), at approximately 2:14 a.m. for speeding. Stines conducted an inappropriate patdown search of Washington and told her that women could offer their bodies to him to get out of a ticket. Washington refused and Stines wrote her a ticket. Washington's boyfriend reported the incident to the Haines City dispatching service at 3:11 a.m.[2] The dispatcher told Washington's boyfriend that the police chief was not on duty and instructed him to call back the next day during normal business hours. Washington reported the incident to Police Chief Freeman ("the Chief") the next day.

Sewell brought a 42 U.S.C. § 1983 action against the Town alleging violations of her Fourth, Eighth, and Fourteenth Amendment rights. The district court denied the Town's motion for summary judgment based on failure to state a claim for municipal liability. After a trial, the jury awarded Sewell $452,000 in damages. The district court denied the Town's motions for judgment as a matter of law, remittitur, and a new trial.

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[2] Lake Hamilton is a small town of approximately 1,000 residents. The Town employs five police officers. Because of its small size, calls to the police station are routed to the dispatcher in neighboring Haines City whenever the station is unmanned. The police station typically is unmanned at night and was unmanned on the night of May 13, 1991.

The Town then perfected this appeal, raising several issues. We address only one: Whether the district court erred in finding that the Town could be liable for the actions of Stines, and thus wrongly denied the Town's motions for summary judgment and for judgment as a matter of law. We review *de novo* the district court's rulings on these motions. *Daniel v. City of Tampa*, 38 F.3d 546, 549 (11th Cir.), *cert. denied*, ___ U.S. ___, 115 S.Ct. 2557, 132 L.Ed.2d 811 (1995).

DISCUSSION

A municipality may be held liable under § 1983 if the plaintiff shows that a "custom" or "policy" of the municipality was the "moving force" behind the constitutional deprivation. *Monell v. Department of Social Services of New York*, 436 U.S. 658, 690-94, 98 S.Ct. 2018, 2035-38, 56 L.Ed.2d 611 (1978). A policy is a decision that is officially adopted by the municipality, or created by an official of such rank that he or she could be said to be acting on behalf of the municipality. *Brown v. City of Fort Lauderdale*, 923 F.2d 1474, 1479-80 (11th Cir.1991). A custom is a practice that is so settled and permanent that it takes on the force of law. *Monell*, 436 U.S. at 690-91, 98 S.Ct. at 2035-36. Obviously, the Town has no policy commanding its officers to barter arrests for sexual favors. Likewise, the Town has no custom of allowing such behavior on the part of its officers. However, municipal liability also may be based on a claim of inadequate training "where a municipality's failure to train its employees in a relevant respect evidences a 'deliberate indifference' to the rights of its inhabitants [such that the failure to train] can be properly thought of as a city 'policy or custom' that is

actionable under § 1983." *City of Canton v. Harris*, 489 U.S. 378, 389, 109 S.Ct. 1197, 1205, 103 L.Ed.2d 412 (1989). Sewell's claim is a failure to train and supervise claim.

It seems apparent to us that Sewell cannot establish deliberate indifference on the part of the Town. As the Second Circuit has held:

> It is not enough to show that a situation will arise and that taking the wrong course in that situation will result in injuries to citizens. . . . *City of Canton* also requires a likelihood that the failure to train or supervise will result in the officer making the wrong decision. Where the proper response . . . is obvious to all without training or supervision, then the failure to train or supervise is generally not "so likely" to produce a wrong decision as to support an inference of deliberate indifference by city policymakers to the need to train or supervise.

Walker v. City of New York, 974 F.2d 293, 299-300 (2nd Cir.1992), *cert. denied*, 507 U.S. 972, 113 S.Ct. 1412, 122 L.Ed.2d 784 (1993) (applying *City of Canton*, 489 U.S. at 390 n. 10, 109 S.Ct. at 1205 n. 10). We are persuaded that the Second Circuit's interpretation of *City of Canton* is correct. Applying the *Walker* reasoning to the facts of this case, we cannot say that the Town acted or failed to act in such a way as to constitute deliberate indifference.

For the foregoing reasons, we reverse the judgment entered on the jury's verdict and remand this case to the

district court with directions that judgment be entered in favor of the Town and against Sewell.

REVERSED and REMANDED.[3]

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[3] Because we have concluded that the Town cannot be held liable for the actions of Stines and have reversed the district court's judgment, we need not address the remaining issues presented in this appeal.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

HEATHER ANN SEWELL,

Plaintiff,

vs.

TOWN OF LAKE HAMILTON, FLORIDA,

Defendant.

_____/

CASE NO. 93-2037-CIV-T-25A

(Filed March 8, 1995)

ORDER

Upon consideration of the pending motions, responses to such motions, and the record herein, it is **ORDERED** that:

1. Defendant's Motion for Summary Judgment (Dkt. #22) is **DENIED.** There exist genuine issues of material fact whether Defendant's policies, customs or omissions caused Plaintiff's injuries and whether Defendant is thereby liable under 42 U.S.C. § 1983. *Monell v. Department of Social Services,* 436 U.S. 658, 98 S.Ct. 2018 (1978); *Vineyard v. County of Murray, Georgia,* 990 F.2d 1207 (11th Cir. 1993); *Anderson v. City of Atlanta,* 778 F.2d 678 (11th Cir. 1985).

DONE AND ORDERED at Tampa, Florida, this 7th day of March, 1995.

/s/ Henry Lee Adams, Jr.
HENRY LEE ADAMS, JR.
UNITED STATES
DISTRICT JUDGE

Copies to:
Counsel of Record

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF DISTRICT OF FLORIDA

HEATHER ANN SEWELL

V.

TOWN OF LAKE HAMILTON, FLORIDA

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 93-2037-CIV-T-25A (Filed May 2, 1995)

[XX] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[__] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered on behalf of the plaintiff, HEATHER ANN SEWELL in the amount of $452,500.

May 2, 1995
Date

DAVID L. EDWARDS,
CLERK
Clerk

/s/ Anne L. Haff
(By) Deputy Clerk

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF DISTRICT OF FLORIDA

HEATHER AND SEWELL

V.

TOWN OF LAKE HAMILTON, FLORIDA

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 93-2037-CIV-T-25A (Filed Nov. 21, 1995)

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[XX] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered on behalf of the plaintiff, HEATHER ANN SEWELL in the amount of $452,500, including attorneys's fees and costs incurred through May 9, 1995, in the amount of $157,403.00.

November 21, 1995
Date

DAVID L. EDWARDS
Clerk

/s/ Illegible
(By) Deputy Clerk